

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Original Affidavits
of Mailing*

77-2041

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2041

GAYLORD W. ANGUISH,

Appellant,

—against—

UNITED STATES OF AMERICA,

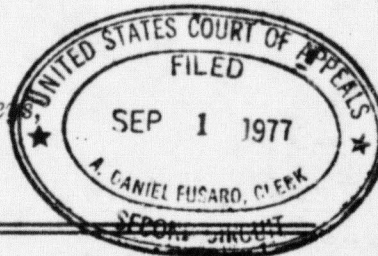
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.*

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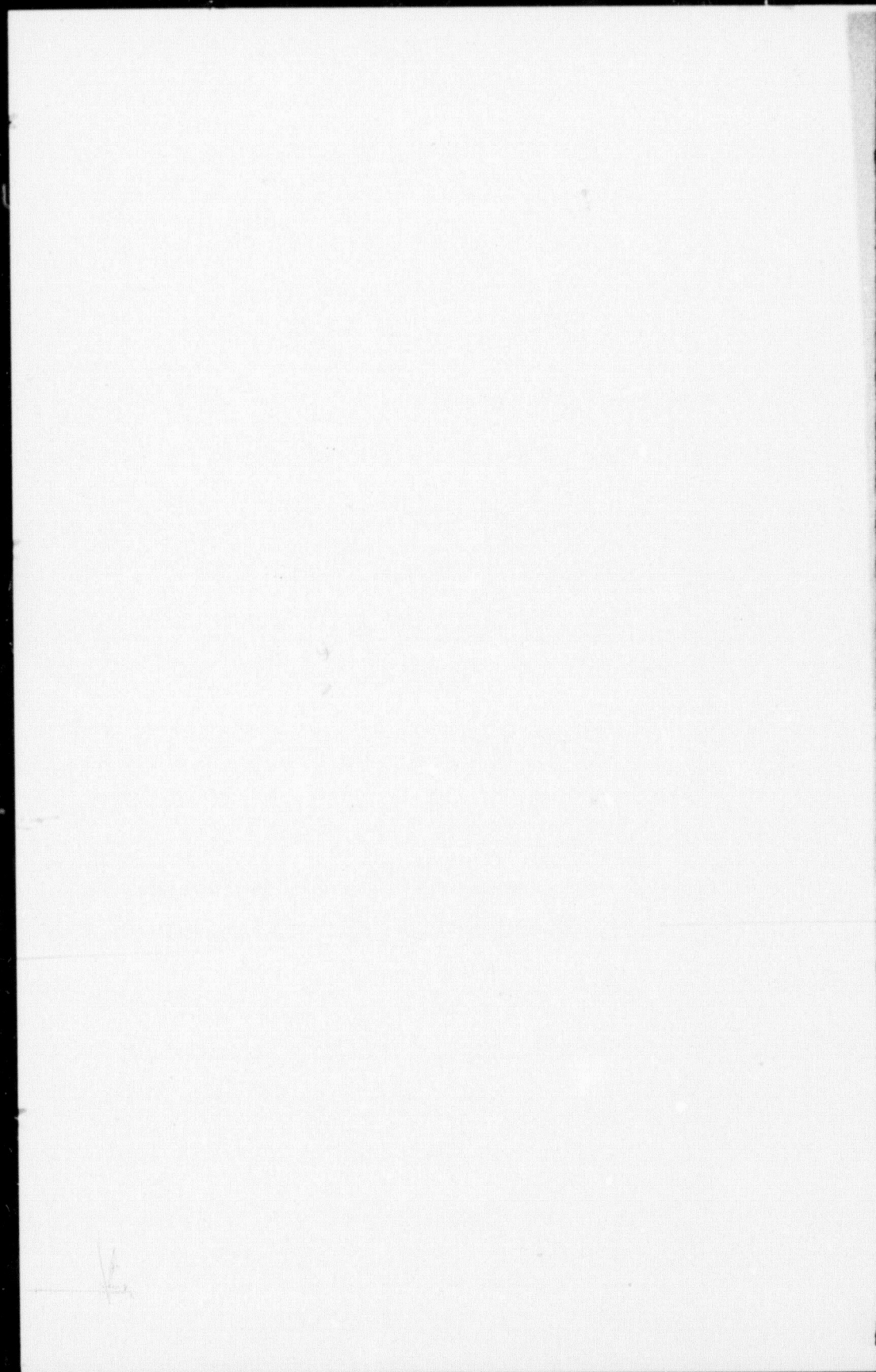


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Docket No. 77-2041

GAYLORD W. ANGUISH,

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--against--

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal by Gaylord Anguish from an order of the United States District Court for the Eastern District of New York (Neaher, J.) entered on March 9, 1977. The order denied a series of applications, pursuant to 28 U.S.C. § 2255, by appellant to set aside as illegally imposed a sentence of ten years imprisonment. The above sentence was imposed on May 6, 1976, following a jury trial convicting Anguish of the armed robbery on July 2, 1974, of the Bankers Trust of Suffolk, 1174 Jericho Turnpike, Commack, New York, in violation of 18, U.S.C. §§ 2113(a) and 2113(d) (Indictment No. 75 Cr. 50). The order also denied collateral attacks upon pleas of guilty by appellant to four additional armed bank robberies (Indictment Nos. 75 Cr. 48, 49, 51 and 52). Following his pleas of guilty to the four additional bank robbery charges, appellant received four concurrent sentences of ten years imprisonment, to be served concur-

rently with the sentence he received for the Bankers Trust robbery.¹

Appellant appealed from the jury trial conviction (No. 75 Cr. 50), and that judgment was affirmed by this Court without opinion on September 24, 1976. *United States v. Anguish*, 551 F.2d 301 (2d Cir. 1976). Appellant is currently serving his sentences.

Appellant attacks his jury trial conviction on various grounds. First, he claims that following the imposition of sentence, he received a probationary period of sixty days and that his right to due process was violated because his probation was subsequently revoked without a hearing. Second, he contends that at sentencing he was not advised of his right to appeal, as required by Rule 32(a), Fed. R. Cr. P. Third, he argues that at trial the court made several erroneous evidentiary rulings. Finally, appellant claims that he was incompetent to stand trial as a result of his alleged amnesia.

Appellant also attacks the convictions entered on his pleas of guilty to the four other armed robberies. In this regard, he raises essentially two claims: first, that there was no basis in fact for the pleas; and second, that he entered the pleas of guilty because of an unfulfilled promise by the court that he would be given probation for all five convictions.

¹ Appellant pleaded guilty to the additional indictments on the date of his sentencing on Indictment No. 75 Cr. 50. (May 6, 1976). He was also sentenced on these indictments on May 6, 1976.

Statement of Facts

A. Pre-trial and trial proceedings

This case has a somewhat lengthy procedural background. On January 31, 1975, appellant pleaded guilty to the armed robbery count in Indictment No. 75 Cr. 50 (the Bankers Trust robbery). Subsequent to the plea, psychiatric reports submitted by the defense for the purpose of sentencing raised questions as to appellant's competency. Consequently, on May 22, 1975, Judge Neaher sent appellant to the Springfield Medical Center for a determination as to his competency under the standard enunciated in *Dusky v. United States*, 362 U.S. 402 (1969). The staff found appellant competent. Nevertheless, on September 30, 1975 appellant moved to withdraw his guilty plea.

On October 10, 1975 appellant claimed for the first time total retrograde amnesia concerning the Bankers Trust robbery as well as the four other armed robberies for which he was indicted. The claim of amnesia triggered a new series of psychiatric evaluations.

On January 12, 1976 Judge Neaher held a day-long evidentiary hearing, in which five psychiatrists testified, to determine whether appellant's plea should be vacated and, if so, whether appellant was competent to stand trial. Appellant testified at the hearing, asserting that he had no recollection of having pleaded guilty on January 31, 1975. On February 10, 1976, Judge Neaher, in a nine page memorandum decision, granted appellant's motion to withdraw his plea of guilty and further found him competent to stand trial. In connection with appellant's claim of amnesia, Judge Neaher stated: "Although the weight of psychiatric opinion was in favor of concluding that defendant's amnesia was more feigned than real, a resolution of this question is not essential to a determination of § 4244 competency."

Thereafter, on April 20, 1976, appellant went to trial on the Bankers Trust robbery and offered a defense of insanity, claiming that he could not conform his conduct to the requirements of the law, and contending that he had been afflicted with amnesia for a period of years, including the time of the robbery. The jury found appellant guilty after deliberating for only forty-five minutes.²

B. Sentencing and post-trial proceedings

On May 6, 1976 appellant appeared for sentencing with both his lawyers (John C. Corbett and Mark Landsman). Each spoke on behalf of appellant. They urged the court to place appellant upon probation so that he could be a patient either at Payne-Whitney Psychiatric Clinic or the Veteran's Hospital at Northport, Long Island (3-5). In response, the court indicated a willingness to permit appellant to pursue psychiatric treatment prior to the commencement of his prison term (10-11). Judge Neaher stated that a means of accomplishing this end would be to impose a prison sentence and to stay the execution for sixty days while appellant underwent psychotherapy (11, 15). The judge stated that during the sixty day stay of the prison sentence appellant would be on "temporary probation" (12). However, the court clearly and explicitly stated that the stay would be granted on the "special condition that he immediately be admitted as an in-patient at the Payne-Whitney Institute for the purposes of psychiatric treatment . . ." (12).

Then, the status of the four other outstanding indictments was discussed. Mr. Corbett said that he had intended "to dispose of all the indictments this morning" (13). The court indicated that it would be willing

² References preceded by the letter "A" are to pages of appellee's appendix. Numbered references are to pages of the transcript of the proceedings of May 6, 1976.

to impose concurrent sentences "if that would help the situation" (13), at which point, appellant offered to plead guilty to the four outstanding bank robbery indictments (16-17).

The court then embarked on a careful Rule 11 inquiry, in the course of which the judge explained to appellant each of the rights he was relinquishing as a result of his pleas of guilty (17-23). After each right was explained to him, appellant stated that he understood the right and what he was doing (17-23). In connection with appellant's right of appeal, the following colloquy occurred:

THE COURT: If you persist in your offer to plead guilty you give up all these rights, trial by jury and opportunity to appeal, but you still have that in the other case, do you understand that?

DEFENDANT ANGUISH: Yes (20).

The court then inquired as to whether any promises were made to appellant to induce the pleas of guilty. Appellant replied that no such promises had been made (21).

Finally, Judge Neaher established a basis in fact for each of the four guilty pleas (21). With respect to each robbery, the court explained to appellant what bank he was charged with having robbed, the location of the bank, the date of the robbery, and the amount of money that was taken (21-22). The court also referred to the trial in which evidence of these other robberies was introduced as similar acts (21). With respect to each robbery charge, appellant, still claiming amnesia, stated: "I am convinced I robbed that bank" (21-22). The court then inquired of both counsel whether they were satisfied that there was a basis in fact for the pleas, and both indicated they were (23). Thereupon, after finding there was a basis in fact for the pleas, and that appellant was acting

voluntarily and knowledgeably, Judge Neaher accepted the four pleas of guilty (23).

At this point, as already noted, the court sentenced appellant to ten years imprisonment on each of the five armed robbery counts, each of the sentences to run concurrently to the other. Execution of the sentences was stayed for sixty days, however, "and the defendant [was] placed on a period of probation for sixty days on special condition that the defendant [would] be an in-patient at the Payne-Whitney Institute, and that he [would] be taken there by a marshal and [would] be obliged to surrender to a marshal at the expiration of the 60 day period" (28). The court further stated that it was counsel's obligation to fulfill the condition of finding appellant a place at the psychiatric hospital (28).

Subsequently, both the Payne-Whitney Institute and the Veteran's Hospital at Northport refused to accept appellant as an in-patient. Accordingly, by the terms of the judgment of conviction, the stay of execution terminated and appellant was turned over to the custody of the Bureau of Prisons (See A. 48).

Not long after his sentencing, appellant filed a brace of 2255 motions challenging his convictions. In June of 1976, he sought to have vacated his jury trial conviction, and on July 21st he attacked his four guilty pleas entered on May 6th. On March 9, 1977, Judge Neaher, in a sixteen page memorandum decision (A. 52), denied, on a consolidated basis, all of appellant's claims. This appeal followed.

ARGUMENT

POINT I

There Is No Basis For Setting Aside Appellant's Conviction On Indictment No. 75 Cr. 50.

As noted above, appellant attacks his jury trial conviction (75 Cr. 50) on numerous grounds. First, he contends that as part of his sentence he was placed upon probation for sixty days and that his probation was illegally revoked without a hearing. Second, he argues that at sentencing the trial judge failed to inform him of his right to appeal. Third, he takes issue with several evidentiary rulings at trial. He contends that the court improperly received into evidence his confession to the F.B.I. of five other bank robberies and that the prosecutor was wrongly allowed to cross-examine a defense psychiatrist on the basis of appellant's prior conviction for burglary, for which he had received a certificate of discharge. Finally, appellant claims that he was incompetent to stand trial because of amnesia. We submit that all of these contentions are without merit.

We note at the outset that on appeal from his jury trial conviction, appellant claimed that he was denied due process and the right to "effective assistance of counsel" as a result of his alleged amnesia. This Court rejected that claim when it affirmed appellant's conviction without opinion. *United States v. Anguish*, 551 F.2d 301 (2d Cir. 1976). By arguing here that he was not mentally present at trial, appellant is simply recasting the same claim he advanced on direct appeal in slightly different language. As Judge Neaher pointed out, "the claim has been denied adversely to him (by this Court) and may not be relitigated" (A. 64). Accordingly,

appellant may not raise this claim anew on collateral attack. *Panico v. United States*, 412 F.2d 1151 (2d Cir.), *cert. denied*, 397 U.S. 921 (1969).

a) Illegal revocation of appellant's "probation"

Appellant's claim that he was illegally denied his right to a hearing, pursuant to Rule 32(f), F. R. Cr. P., upon the revocation of his "probation" is based upon the faulty premise that he was placed upon probation. Judge Neaher found that appellant had never been placed upon probation (A. 60). The sentencing minutes make it clear that the court merely *stayed* the imposition of appellant's sentence for sixty days so that he could receive psychiatric treatment (7, 15). The judgment of conviction reads: "Execution of sentence is stayed for sixty days on special condition that the defendant will be an in-patient at Veteran's Administration Hospital, Middleville, Long Island and that he will be taken by a United States Deputy Marshal and will be obliged to surrender to the Marshal at the end of the 60 days" (A. 48). Indeed, the judge stated that during the stay appellant would remain in federal custody (7).

Assuming *arguendo* that appellant was placed upon some type of limited probation, the judge specified at sentencing that the "probation" would become effective provided that appellant and his counsel fulfill the condition precedent of finding a hospital that would accept him as an in-patient (28). That condition was not fulfilled, since neither the Payne-Whitney Institute nor the Veteran's Administration Hospital would receive him as an in-patient. In fact, after examining appellant, the latter institution reported he was not in need of such care. As Judge Neaher stated in his decision (A. 55): "Since that was a special condition, he was accordingly turned over to the custody of the Bureau of Prisons to serve his sentence." Finally, as noted in the judge's decision, appellant is currently receiving psychiatric treatment in prison (A. 55).

b) Failure to inform appellant of his right to appeal

Appellant claims that at sentencing he was not advised of his right to appeal. It will be recalled that appellant pleaded guilty at sentencing to four other indictments for armed bank robbery. As indicated in the Statement of Facts (p. 5), the judge did indicate to appellant in the course of the Rule 11 inquiry that he did have the right to appeal his jury trial conviction. In any event, appellant did appeal his conviction on indictment 75 Cr. 50 so that any conceivable error in the judge's explanation is moot.

c) The introduction of appellant's confession

Appellant claims that his oral statement to the F.B.I. in which he admitted having committed six armed robberies should not have been admitted at trial because 1) it was used by the Government to show his criminal disposition and 2) the statement was made on the promise that the F.B.I. would permit appellant to stand trial in California.

First, the confession was introduced in the Government's rebuttal case only after appellant offered a defense of insanity. The confession was offered as proof of similar crimes for the limited purpose of showing appellant's knowledge, intent and state of mind. This ruling was proper. Rule 404(b), Fed. R. Ev. Following the introduction of this testimony Judge Neaher gave carefully limited instructions to the jury, explaining "... the defendant is not on trial for any of these other bank robbery episodes that you have heard about here and that if you were to accept the view that he was not responsible for the July 2nd robbery, for which he is on trial, you would not be permitted to convict him because you heard this other evidence" (Tr. of April 22, 1976, 482). See *United States v. Warren*, 453 F.2d

738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967).

Second, there is not a shred of evidence in the record, nor has appellant cited this Court to any, to justify a claim that appellant confessed to the robberies on the promise by the F.B.I. that he would be prosecuted in California. Prior to trial, the court held an evidentiary hearing to determine whether the confession was voluntary. Judge Neaher ruled that it was. At the hearing, appellant did not assert the claim he now advances here. Thus, since appellant did not raise this issue at trial, he could not have raised it on direct appeal, much less on collateral attack. See *United States v. Rollins*, 522 F.2d 160, 167 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

d) The prosecutor's use in cross-examination of appellant's prior conviction

Appellant claims that the prosecutor improperly used his prior conviction for burglary when cross-examining a defense psychiatrist. This claim is without merit.

After the Government rested, the defense offered a defense of insanity. Dr. Lawrence Bloom testified that appellant could not conform his conduct to the requirements of the law at the time of the bank robbery. During cross-examination, Dr. Bloom stated the following:

(DR. BLOOM): I think that this man's underlying personality is one in which the—it sounds like a cliché—the kind of man who wouldn't hurt a fly. I think that he's a very idealistic man, up until the time of his wife's death, a highly moral man, a man who values life sacredly (Tr. of April 21, 1976, 264).

In response, the prosecutor asked the doctor whether he was aware appellant had been convicted in 1963 of burglary, to which the doctor replied that he was. The prosecutor then asked the doctor whether he considered burglary "a moral thing to do," to which the doctor replied that he considered it an "immoral thing to do" (Tr. of April 21, 1976, 265). The following colloquy then ensued:

Q. You also testified that after the death of his wife, his behavior radically changed?

A. Yes.

Q. Did you take into account the conviction when you made that statement?

A. I wasn't thinking about that, no (265-266).

Prior to this line of questioning, the prosecutor asked permission of the judge to inquire of Dr. Bloom about this conviction. Appellant objected solely on the grounds that the conviction was too remote and was too prejudicial. The judge permitted the cross-examination for the sole purpose of impeaching the doctor's testimony (Tr. of April 21, 1976, 226).

As disclosed by the probation report, the conviction for the Texas burglary was set aside after appellant "fully complied with all general and special provisions under his probationary period and that more than one-third (1/3) of his time has elapsed under the original sentence." Whether or not this discharge constitutes a "certificate of rehabilitation" is unclear. Cf. *United States v. DiNapoli*, — F.2d — (2d Cir., Slip op. 4281, 4285; decided June 20, 1977). See Rule 609(c), Fed. R. Ev. However, even if the discharge did so qualify, it was proper to inquire into the burglary in order to rectify the misleading impression created by Dr. Bloom's statement that appellant had led a moral life up until the bank robbery. Questions as to the burglary were

also proper to show that the doctor had not taken into account an important facet of appellant's life in arriving at his conclusions. See *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976).

Moreover, this point was not raised on appeal and constitutes a deliberate bypass of appellate procedure. Finally, as Judge Neaher stated in his decision, this claim "does not rise to constitutional dimension, in light of the psychiatrist's testimony that he was aware of the earlier conviction and that it did not alter his opinion that defendant's recent behavior was a radical change from a prior moral life" (A. 63).

POINT II

There Is No Basis For Setting Aside Appellant's Four Guilty Pleas To Indictment Nos. 75 Cr. 48, 49, 51 And 52.

As noted above, on May 6, 1976, appellant pleaded guilty to four separate outstanding indictments for armed robbery (75 Cr. 48, 49, 51 and 52). On appeal, he renews his 2255 challenge to those pleas on two grounds: first, that there was no factual basis established for the pleas and, second, that he pleaded guilty upon the promise by the court that he would be given probation for sixty days at a psychiatric hospital. These arguments are frivolous.

With respect to the first claim, Judge Neaher accepted the guilty pleas after having presided at a trial in which evidence concerning the other four bank robberies was introduced. This evidence included a confession by appellant as to all five robberies (before the onset of the alleged amnesia), the gun he used to commit the robberies, and separate rental agreements for the different auto-

mobiles be used as getaway cars in order to commit the robberies. Judge Neaher referred to this evidence when establishing a factual basis for the pleas (21). Moreover, when asked by Judge Neaher whether he committed each robbery, appellant replied that he was convinced he did. These statements, combined with the evidence detailed above, were clearly sufficient to establish a factual basis for the four guilty pleas. *Irizarry v. United States*, 508 F.2d 960, 967 (2d Cir. 1974). Furthermore, when Judge Neaher asked both of appellant's counsel whether they were satisfied there was a factual basis, both replied that they were (23).

Appellant's claim that he was induced to plead guilty to these four indictments on the promise that he would be given sixty days probation is simply not supported by the record. In the first place, when asked by the Court, appellant stated that no promises had been made to him to induce his pleas (20-21). In addition, at no point did Judge Neaher state or imply to appellant that he intended to give him probation for five armed bank robberies. The record is clear that, prior to the imposition of sentence, the only reasonable expectation appellant could have had was that he would receive concurrent prison terms for all the robberies and be given a sixty day stay of the imposition of sentence in order to pursue psychotherapy, *provided* he was accepted as an in-patient. There is no basis to upset the four guilty pleas.

CONCLUSION

The order of the district court should be affirmed.

Dated: Brooklyn New York
August 25 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of September 19 77 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
GAYLORD ANGUISH, P.O. BOX 1000, LEWISBURG, PA. 17837

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

1st day of September 19 77

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41419208